

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 26, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1780

Cir. Ct. No. 2006FA6891

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE MARRIAGE OF:

KIMBERLY C. HYING,

JOINT-PETITIONER-RESPONDENT,

v.

MARTIN B. HYING,

JOINT-PETITIONER-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
FREDERICK C. ROSA, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Martin B. Hying appeals the circuit court's order of June 26, 2014. He argues: (1) the circuit court misused its discretion in awarding sole legal custody of the parties' child to Kimberly C. Niemi, his former

wife; (2) the circuit court misused its discretion in denying him physical placement with his daughter; (3) the circuit court misused its discretion in ordering that his daughter's periods of physical placement with him be resumed as deemed appropriate by his daughter's therapist; (4) the circuit court misused its discretion in ordering that he pay \$23,616 of Niemi's attorney fees; and (5) the circuit court misused its discretion in ordering him to pay 75% of the guardian *ad litem*'s fees. We affirm.

¶2 Hying and Niemi were divorced in November 2007, at which time their child was two and one-half years old. Niemi was awarded primary physical placement. They were awarded joint legal custody. Since the divorce, the relationship between Hying and Niemi has been acrimonious and there has been nearly constant litigation in both the circuit court and this court. In April 2014, a trial was held on motions by both parties regarding custody and placement. The circuit court awarded Niemi sole legal custody and primary physical placement.

¶3 Hying argues that the circuit court misused its discretion in awarding sole legal custody to Niemi. We will affirm a circuit court's custody determination unless the circuit court misuses its discretion. *Alice H. v. Melvin R.J.*, 2000 WI App 228, ¶18, 239 Wis. 2d 194, 619 N.W.2d 151. We will sustain a circuit court's discretionary decision on appeal if the court considers "the correct law and the facts of record, and employs a logical rationale in arriving at its decision." *Id.*

¶4 When deciding custody and placement issues, the circuit court "shall consider all facts relevant to the best interest of the child." WIS. STAT.

§ 767.41(5)(am) (2013-14).¹ Among other things, the court shall consider the wishes of the child and the child's parents, the interactions of the child with her parents, "[t]he child's adjustment to the home, school, ... and community," the availability of child care services, "[t]he cooperation and communication between the parties and whether either party unreasonably refuses to cooperate or communicate with the other party," "[t]he amount and quality of time that each parent has spent with the child in the past," and "[w]hether the mental or physical health of a party ... negatively affects the child's intellectual, physical, or emotional well-being." *Id.*

¶5 The circuit court made the following factual findings with regard to legal custody: Hying unreasonably refuses to cooperate with Niemi; Hying has repeatedly refused to follow court orders; the communication between the parties has deteriorated to such an extent that the parties will not be able to cooperate in the decision making required for an award of joint legal custody; despite admonishments from numerous courts, Hying's communication continues to be threatening, belittling, and bullying toward Niemi; the child was forced to leave the daycare center she was attending due to Hying's actions; the Greendale School District has a harassment injunction against Hying; Professional Service Group was directed by order of February 22, 2010, to oversee the transitions of the child between Hying and Niemi; there was a delay in implementing this order due to Hying's actions; Hying would not cooperate and sued the director of Professional Service Group personally; the first weekend that Hying had placement after a significant lapse due to his non-compliance, he refused to bring the child to her

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

yearly dance recital unless Niemi would meet his demands; Niemi wants Hying to have a relationship with the child; Hying has not had placement for approximately three years due to his own actions; Hying's daughter has little to no relationship with Hying at this time; both parties agree that the child needs therapeutic intervention; and Hying is unable to recognize the impact of his words and actions on his daughter.

¶6 The circuit court considered the statutory factors enumerated in WIS. STAT. § 767.41(5)(am) and applied them to the circumstances of this case when it made its factual findings. Hying has not been able to properly communicate and cooperate with Niemi and the other people involved in his child's life. He is unable to recognize how his obstreperous actions are affecting his child. Because the circuit court considered the facts of this case in light of the applicable law and made a reasonable decision, we conclude that the circuit court properly exercised its discretion in awarding Niemi sole legal custody.

¶7 Hying next contends that the circuit court erred in denying him physical placement with his daughter because it did not make a factual finding that placement with him would endanger the child's physical, mental, or emotional health as required by WIS. STAT. § 767.451(4) ("a court may deny a parent's physical placement rights at any time if it finds that the physical placement rights would endanger the child's physical, mental or emotional health"). Hying's argument fails because Niemi has not requested that Hying be denied placement, and the circuit court has not ordered that Hying be denied placement. The circuit court directed that placement be held open and ordered the guardian *ad litem* to facilitate *reunification* between Hying and the child. WISCONSIN STAT. § 767.451(4) applies where one parent seeks to deny all physical placement to the

other parent. *See Wolfe v. Wolfe*, 2000 WI App 93, ¶2, 234 Wis. 2d 449, 610 N.W.2d 222. The statute is not applicable in this case.

¶8 Hying next argues that the circuit court misused its discretion in ruling that reunification between him and his daughter should occur “as deemed appropriate by [his daughter’s] therapist.” He contends that this order is improper because it is a “prospective order,” and it prohibits him “from requesting a change in physical placement in the future.” *See Alice H.*, 239 Wis. 2d 194, ¶25 (A circuit court must make placement decisions based on historical and present factors; it may not “authorize a prospective order prohibiting a parent from requesting a change in physical placement in the future” or authorize “decisions regarding future events.”).

¶9 We reject Hying’s argument. The circuit court’s order was properly based on the history between the parties and the current circumstances then before the court. The court concluded that it would be in the best interest of the child for the guardian *ad litem* to facilitate reunification between Hying and his daughter in accord with the recommendations of the therapist, who would be aware of and working to improve the child’s mental health and emotional state. The order does not make a decision regarding a future event; it directs the guardian *ad litem* to immediately facilitate the reunification process. Similarly, the order does not prohibit Hying from moving to modify the circuit court’s placement order in the future. We therefore conclude that the circuit court properly exercised its discretion in ordering the guardian *ad litem* to oversee reunification between Hying and his daughter under the guidance of Hying’s daughter’s therapist.

¶10 Hying next challenges the circuit court’s order that he pay \$23,616 in attorney fees to Niemi’s lawyers due to his excessive litigation in this case. The

circuit court may award attorney fees in an action involving custody or placement of a child when one of the parties “has caused additional fees by overtrial.” *Randall v. Randall*, 2000 WI App 98, ¶22, 235 Wis. 2d 1, 612 N.W.2d 737. “The decision whether to award attorney fees is committed to the circuit court’s discretion.” *Id.*

¶11 The circuit court found that Hying engaged in unnecessary excessive litigation in this case. The circuit court found that he continued to file motions with the circuit court and Family Court Commissioner’s Office during a prior appeal, causing Niemi to incur unnecessary attorney fees, despite an order dated September 20, 2011, prohibiting him from doing so. The circuit court also found that Hying continues to file motions and objections to court orders, often meritless, to which Niemi’s lawyers are forced to respond. The circuit court’s factual findings about Hying’s conduct support its order that he pay a portion of Niemi’s attorney fees. The circuit court did not misuse its discretion.

¶12 Finally, Hying argues that the circuit court misused its discretion in ordering him to pay 75% of the guardian *ad litem* fees. The circuit court may award unequal allocation of guardian *ad litem* fees as a sanction for excessive litigation. *See Hottenroth v. Hetsko*, 2006 WI App 249, ¶54, 298 Wis. 2d 200, 727 N.W.2d 38. Public policy dictates that “[a] party who is the victim of overtrial that required the services of a guardian ad litem should not be burdened with the payment of ‘extra and unnecessary’ guardian ad litem fees ‘that were occasioned by the other party.’” *Id.* (citation omitted). We will affirm a circuit court’s award of unequal allocation of guardian *ad litem* fees unless it misuses its discretion. *Id.*, ¶55.

¶13 As previously discussed, the circuit court found that Hying engaged in overtrial. The circuit court also found that the guardian *ad litem* was required to spend time addressing Hying's many motions and objections, thus incurring additional guardian *ad litem* fees. The circuit court's factual findings about Hying's conduct support its order that he pay 75% of the guardian *ad litem* fees. The circuit court did not misuse its discretion.

By the Court.—Orders affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

